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Nos. 92-1222 and 92-7394

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1992

HAROLD M. FISHMAN

v.

UNITED STATES OF AMERICA

ALAN WEINSTEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court erred in declining to hold an evidentiary hearing on a disputed issue of fact at sentencing.

2. Whether the government adequately established the state-law predicate offenses that formed the basis for petitioners' convictions under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*

3. Whether RICO is unconstitutionally vague.

4. Whether mail fraud in violation of 18 U.S.C. 1341 (1988 & Supp. III 1991) constitutes a RICO predicate offense when the fraudulent scheme involves a violation of a state perjury statute that does not itself constitute a predicate offense.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-45a)[1] is reported at 974 F.2d 246.

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[1] "Pet. App." refers to the appendix to the petition in No. 92-1222.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 1992. A petition for rehearing was denied on October 20, 1992. Pet. App. 46a. The petition for a writ of certiorari in No. 92-1222 was filed on January 19, 1993 (a Tuesday after a Monday holiday). The petition for a writ of certiorari in No. 92-7394 was filed on January 27, 1993, and is therefore out of time under Rule 13.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[2]

STATEMENT

After a four-month jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted of racketeering and conspiracy to engage in racketeering, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(c) and (d). Petitioner Fishman was sentenced to 37 months' imprisonment, fined $25,000, and ordered to forfeit $10,000. Petitioner Weinstein was sentenced to 30 months' imprisonment and was fined $10,000. Gov't C.A. Br. 2. The court of appeals affirmed. Pet. App. 1a-45a.

1. Morris J. Eisen, P.C., was a Manhattan law firm that specialized in bringing personal injury suits on behalf of plaintiffs. The Eisen firm earned millions of dollars in contingency fees by bringing false personal

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[2] Several of petitioners' co-defendants previously filed petitions in this Court. See *Eisen* v. *United States*, Nos. 92-919, 92-968, and 92-969. Petitioners incorporate by reference some of the arguments in those petitions. 92-1222 Pet. 29-30; 92-7394 Pet. 16, 26. See also 92-7394 Pet. 18-26; 92-1222 Pet. 31-33.

injury suits, paying friendly witnesses to testify favorably and hostile witnesses not to testify at all, and creating false photographs, documents, and physical evidence of accidents for use before and during trial. Petitioner Fishman, a trial attorney, was associated with the Eisen firm in an "of counsel" capacity. In late 1985, Fishman resigned from the Eisen firm and began practicing with another firm. Petitioner Weinstein was a private investigator affiliated with the Eisen firm. Pet. App. 3a-4a; see Gov't C.A. Br. 5-29, 193-194; 92-1222 Pet. 4-5.

2. A grand jury indicted petitioners for racketeering and conspiracy to commit racketeering, in violation of 18 U.S.C. 1962(c) and (d). To establish the requisite "pattern of racketeering activity," the indictment alleged that petitioners had bribed witnesses, in violation of N.Y. Penal Law § 20.00 (McKinney 1987) and § 215.00 (McKinney 1975), and committed mail fraud, in violation of 18 U.S.C. 1341 (1988 & Supp. III 1991). Indictment 1-37. At trial, the government offered the testimony of some of petitioners' former accomplices to establish the predicate racketeering acts.

A jury convicted petitioners on the racketeering and racketeering conspiracy counts. The probation office submitted a presentence report that recommended sentencing pursuant to the Sentencing Guidelines on the RICO conspiracy count. See Fishman Presentence Report 18-19. Petitioners claimed that they were not subject to sentencing under the Guidelines because they withdrew from the conspiracy prior to November 1, 1987, the effective date of the Guidelines. See Fishman Sentencing Memorandum 1 n.1. They requested an evidentiary

hearing to resolve that issue. See Pet. App. 44a-45a; Gov't C.A. Br. 195 & n.62.

The district court denied petitioners' request for an evidentiary hearing and concluded that they had not withdrawn from the Eisen conspiracy prior to November 1, 1987. The court of appeals noted that "the District Court found that there was evidence that, after leaving the law firm, Fishman 'continued to be entitled to a percentage of the recovery on all cases he tried including those giving rise to his pre-1985 racketeering acts.' " Pet. App. 44a. Moreover, petitioner Fishman concedes in this Court that "[s]ome of the money verdicts won by Petitioner for the Eisen firm in 1984 continue to be owed at this time." 92-1222 Pet. 23 n.3. The district court also relied on the fact that "in February 1988, Fishman, together with * * * Weinstein, sought to convince [a government witness] to lie to investigators," an act "designed to conceal [the] ongoing conspiracy [and] in furtherance of that conspiracy." Pet. App. 45a n.8.

3. The court of appeals affirmed. The court concluded that mail fraud may serve as a RICO predicate offense even when the fraudulent scheme effectuated by the mailing involves a state-law perjury offense that would not itself constitute a predicate offense under RICO. Pet. App. 10a. The court also upheld the district court's conclusion that petitioners did not withdraw from the Eisen conspiracy prior to the effective date of the Sentencing Guidelines, and the district court's decision not to hold an evidentiary hearing on that issue. *Id.* at 44a-45a & n.8. The court summarily disposed of a number of petitioners' other claims, "find[ing] them to be without merit." *Id.* at 45a.

ARGUMENT

1. Petitioners claim (92-1222 Pet. 14-28; 92-7394 Pet. 26-27) that the district court erred in denying them an evidentiary hearing on the issue whether they withdrew from the Eisen conspiracy before November 1, 1987, the effective date of the Sentencing Guidelines. Petitioners do not dispute that ongoing offenses that "straddle" the effective date of the Sentencing Guidelines are subject to the Guidelines. See 92-1222 Pet. 15, 19-21; Pet. App. 41a (citing *United States* v. *Story*, 891 F.2d 988, 994 (2d Cir. 1989)). Their claim is only that the district court did not provide them with an adequate opportunity to determine the disputed factual question whether they affirmatively withdrew from the conspiracy prior to the effective date of the Guidelines. See 92-1222 Pet. 26. That claim is without merit.

Relying on this Court's decision in *Burns* v. *United States*, 111 S. Ct. 2182 (1991), petitioners argue that the Due Process Clause requires a sentencing court to hold an evidentiary hearing on any "critical sentencing factor." 92-1222 Pet. 15. The Sentencing Commission, however, has recognized that, while "[a]n evidentiary hearing may sometimes be the only reliable way to resolve disputed issues * * * [t]he sentencing court must determine the appropriate procedure in light of the nature of the dispute, its relevance to the sentencing determination, and applicable case law." Guidelines § 6A1.3, Commentary. Thus, as the court of appeals recognized, "the District Court has broad discretion to determine the procedure by which it will resolve disputed issues at sentencing, so long as it affords the

defendant some opportunity to rebut the Government's allegations." Pet. App. 44a-45a. See also *United States* v. *Prescott*, 920 F.2d 139, 143-144 (2d Cir. 1990); *United States* v. *Mueller*, 902 F.2d 336, 347 (5th Cir. 1990); cf. *United States* v. *Fortenbury*, 917 F.2d 477, 480 (10th Cir. 1990). Petitioners cite no cases supporting their theory that due process requires an evidentiary hearing in all cases where there is a disputed factual issue at sentencing that may have a significant impact on the defendant's sentence.

This Court's decision in *Burns* is not to the contrary. *Burns* merely held that the Sentencing Reform Act of 1984 and Rule 32 of the Federal Rules of Criminal Procedure require the district court to give notice and an opportunity to be heard to both parties before departing upward from a Guidelines sentencing range. See 111 S. Ct. at 2185. It did not suggest that sentencing courts must hold an evidentiary hearing every time a defendant raises a significant factual dispute at sentencing.

In this case, the district court provided petitioners with an adequate opportunity to rebut the government's contention that they remained in the Eisen conspiracy after November 1, 1987. The court relied primarily on testimony adduced during petitioners' trial, see Pet. App. 43a-45a & n.8, which was subject to cross-examination. In light of the fact that courts may rely on out-of-court statements and hearsay in making sentencing determinations, see Sentencing Guidelines § 6A1.3, Commentary, it follows *a fortiori* that trial testimony is ordinarily sufficiently reliable to be used in sentencing. The district court heard, and was in the best position to credit, the trial

testimony on which it relied, and it accordingly was not an abuse of discretion for the court to decline to hold a separate evidentiary hearing.

2. Petitioners contend (92-1222 Pet. 29-30; 92-7394 Pet. 11-18) that the bribery offenses that were used as predicate acts to establish RICO liability were not "chargeable under State law" for purposes of 18 U.S.C. 1961(1)(A) (1988 & Supp. III 1991). Petitioners' co-defendants raised that issue in their petitions for certiorari, and we have addressed that issue in our brief in opposition to those petitions. See U.S. Br. in Opp., in *Eisen* v. *United States*, Nos. 92-919, 92-968, and 92-969.[3] For the reasons stated in that brief, petitioners' claim lacks merit and this Court's review is unwarranted.

3. Petitioner Weinstein contends (92-7394 Pet. 26) that the RICO statute is unconstitutionally vague. We also addressed that claim in our brief in opposition in Nos. 92-919, 92-968, and 92-969. For the reasons stated in our earlier response the claim also lacks merit and does not warrant review.

4. Petitioners claim (92-7394 Pet. 18-26; 92-1222 Pet. 31-33) that mail fraud in violation of 18 U.S.C. 1341 (1988 & Supp. III 1991) is not a valid predicate offense under RICO if the fraudulent scheme involves state-law perjury offense, because perjury is not a predicate offense under RICO. As with petitioners' other claims, we addressed that issue in our prior brief in opposition, and we rely on that response here.

Petitioners, however, make an additional argument in support of this claim that we did not address in our

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[3] We have provided petitioners with a copy of our brief in opposition in Nos. 92-919, 92-968, and 92-969.

prior opposition. Petitioners argue (92-7394 Pet. 18-20; 92-1222 Pet. 31-33) that the mail fraud in this case did not involve the taking of tangible property and that the court of appeals' decision thus conflicts with this Court's decision in *McNally* v. *United States*, 483 U.S. 350 (1987), and with the Seventh Circuit's decision in *United States* v. *Eckhardt*, 843 F.2d 989, cert. denied, 488 U.S. 839 (1988). Contrary to petitioners' claim, the decision in this case is consistent with *McNally* and *Eckhardt*.

The court of appeals correctly recognized that under *McNally*, mail fraud must involve "wronging one ~~in~~ his property rights by dishonest methods or schemes." Pet. App. 5a-6a. Applying that principle, the court of appeals concluded that "the mail fraud predicates at issue here allege a scheme to defraud that comports squarely with the *McNally* definition of mail fraud because the Eisen indictment explicitly alleges a scheme to deprive the victims of money." *Id.* at 6a; see, *e.g.*, Indictment 18-19 (discussing the "scheme and artifice to defraud the civil defendants in the *Schwartz* Case and their liability insurance companies by * * * causing two witnesses * * * to testify falsely"). It is clear that petitioners' scheme deprived numerous litigants of their property, because fraudulent verdicts and settlements were obtained through the device of the mail frauds charged in the indictment. Thus, the decision below was consistent with the requirements of *McNally*.

Nor does the decision in this case conflict with the Seventh Circuit's decision in *Eckhardt*. In that case, the defendant defrauded certain investors in a tax shelter scheme by taking money they had given him to invest in cattle and instead investing it in

certificates of deposit in his own name. 843 F.2d at 991-993. In attempting to cover up his crime, the defendant made false statements to the Internal Revenue Service and committed perjury in connection with audits of his investors' tax returns. The indictment accused the defendant of wire fraud, because he used a telephone in attempting to conceal his misconduct. The fraudulent objectives alleged by the indictment included: (a) impairing and obstructing the Internal Revenue Service's efforts to collect taxes; (b) committing perjury in the Tax Court proceedings; (c) supplying his investors with false financial statements to use in their tax returns; and (d) "obtain[ing] money and property by false and fraudulent representations and pretenses." *Id.* at 996.

Applying *McNally*, the Seventh Circuit concluded that the first three objectives were deficient because they did not allege that the defendant defrauded anyone of money or property.[4] With respect to the last objective, however, the *Eckhardt* court concluded that it sufficiently alleged that the defendant's fraudulent scheme involved property or money. The court accordingly held that the indictment was sufficient under *McNally*. 843 F.2d at 996-998.

The decision in *Eckhardt* provides no support for petitioners. Unlike the indictment in *Eckhardt*, the indictment in this case alleged, and the government proved at trial, that petitioners' conspiracy defrauded individuals of tangible property. See Pet. App. 7a-9a.

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[4] Under Seventh Circuit precedent, see *United States* v. *Gimbel*, 830 F.2d 621 (1987), obstructing a federal agency's efforts to collect revenue did not constitute defrauding that agency of tangible property within the meaning of *McNally*.

While it may be true, as the *Eckhardt* court stated, that perjury by itself does not defraud the government of tangible property, petitioners' conduct in this case did have the effect of defrauding others of such property. The court of appeals was therefore correct in stating that petitioners' reliance on *Eckhardt* is "unavailing," because the indictment in this case "contained precisely what was found to be lacking in the *Eckhardt* indictment: the allegation of a scheme to defraud the litigant of money or property." *Id.* at 7a. Accordingly, there is no conflict between the decision in this case and the decision in *Eckhardt*, and further review is unwarranted.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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